UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DARRIAN DEANGELIS JORDAN and MENDOOR LAMONT SMITH, Defendants.	No. CR04-2003-LRR **REPORT AND RECOMMENDATION ON MOTIONS TO SUPPRESS**

I. INTRODUCTION

On January 21, 2004, Darrian Deangelis Jordan ("Jordan") and Mendoor Lamont Smith ("Smith") were charged in a three-count Indictment returned by the United States Grand Jury for the Northern District of Iowa. Jordan was charged in Count 1 with possession of crack cocaine with the intent to distribute, and in Count 2 with possession of powder cocaine with the intent to distribute. Smith was charged in Count 3 with possession of marijuana with the intent to distribute.

On March 1, 2004, both Smith and Jordan filed motions to suppress and supporting briefs asking the court to order the suppression of certain evidence in this case. (Doc. Nos. 25 & 26, respectively). On March 2, 2004, Jordan filed a separate motion asking to join in Smith's motion to suppress (Doc. No. 25), which the court granted on March 9, 2004 (Doc. No. 33).

In Smith's motion to suppress, he challenges the validity of a state search warrant issued for the search of an apartment located at 1615 Oakwood Drive, Waterloo, Iowa. Jordan joins in this challenge, and in a separate motion to suppress, argues the search of

his person during the execution of the search warrant violated his rights under the Fourth Amendment of the United States Constitution because he was not specifically named in the warrant. He also argues statements attributed to him after his arrest should be suppressed because he did not make them, and because he was not advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966). At the suppression hearing, Jordan withdrew his request to suppress his statements.

On March 10, 2004, the plaintiff (the "Government") filed its resistance to the motions, together with a supporting brief. (Doc. No. 35) The motions have been assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. Accordingly, the court held a hearing on the motions on March 16, 2004, in Cedar Rapids, Iowa. Assistant United States Attorney Stephanie Rose appeared on behalf of the Government. Smith appeared in person with his attorney, John J. Bishop. Jordan appeared in person with his attorney, Assistant Federal Defender Joanne Lilledahl.

Deputy Sheriff William Herkelman of the Tri-County Drug Task Force was called as a witness by both the defendants and the Government. The following exhibits were admitted into evidence: **Gov't Ex. 1**, the search warrant papers (7 pages), and **Gov't Ex. 2** (2 pages), a chronological report of the search.

The court finds the motions have been fully submitted and are ready for consideration.

II. FACTUAL BACKGROUND

On November 13, 2003, Deputy Herkelman submitted an affidavit to a state magistrate in support of an application for a search warrant. According to Herkelman's affidavit, a confidential informant ("CI") had advised him that Smith was selling marijuana from a residence in Waterloo, Iowa, where Smith lived with another black male who also

sold drugs from the residence. From a traffic citation issued to Smith, Herkelman determined that Smith was living at 1615 Oakwood Drive in Waterloo, Iowa. The CI told Herkelman that a vehicle with Illinois license plates would be parked in the driveway of the address. Herkelman determined that a white Pontiac Grand Am with Illinois license plates was parked in the driveway at Smith's address.

According to Herkelman, within the preceding week, the CI had made a controlled purchase of marijuana from Smith at the residence. The CI also advised Herkelman that during the preceding "twenty-four to seventy-two hour" period, the CI had seen marijuana packaged for sale in Smith's residence. In his affidavit, Herkelman stated Smith's criminal record included a March 20, 1998, arrest for possession of marijuana, interference with official acts, assault on a peace officer, and disorderly conduct; a November 18, 1998, arrest for possession of marijuana with intent, a drug tax stamp violation, and interference with official acts; a November 25, 1998, arrest for possession of crack cocaine with intent to deliver and a drug tax stamp violation; and a September 14, 2003, arrest for interference with official acts, possession of marijuana, and driving while license suspended.

On an "informant's attachment" attached to the affidavit, Herkelman represented the CI was reliable for the following reasons:

> The informant is a concerned citizen who has been known by [Herkelman] for 2 years and Who: Is a mature individual.
>
> The informant has supplied information in the past 7 times.
>
> The informant's past information has helped supply the basis for 1 search warrant[].
>
> The informant's past information has led to the making of 1 arrest[].
>
> Past information from the informant has led to the discovery and seizure of stolen property, drugs, or other contraband.

> The information supplied by the informant in this investigation has been corroborated by law enforcement personnel [as indicated in the narrative].
>
> Past information from the informant has led to the filing of the following charges: [federal narcotics charges for possession with intent to distribute crack and cocaine and various other pending charges].

(Gov't Ex. 1) Optional language on the form that Herkelman did *not* select included the following: the CI is a person of truthful reputation, the CI has no motivation to falsify the information, the CI has no known association with known criminals, the CI has no known criminal record, and the CI has not given false information in the past. Herkelman acknowledged in the attachment that the CI was a paid informant.

Based on this information, Herkelman asked the state magistrate to issue a search warrant to search the apartment for marijuana, any other illegal narcotics, paraphernalia, and firearms. On November 13, 2003, the magistrate issued the search warrant, authorizing a search of the following: "1615 Oakwood Drive in Waterloo, Iowa which is a tan single family one story dwelling, the surrounding curtilage and any person located on the property at the time of the search warrant."[1] The warrant also included the following language: "You are commanded to make immediate search of person, premises, place of residence, or vehicle and if said property or any part thereof be found, you are commanded to bring said property forthwith before me at my office." (*Id.*)

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[1]The magistrate set forth the following "Abstract of Testimony" in his endorsement of the search warrant application:

> Court finds that the confidential informant is a credible individual who has been know to law enforcement for 2 yrs and is mature. Court also determines that as the informant has provided information on numerous occasions resulting in an arrest and the information has been corroborated by law enforcement probable cause exists. Lastly, although the informant is paid the informant provides credible, consistent, and corroborated information for this warrant.

(Gov't Ex. 1).

Herkelman testified at the suppression hearing that the CI actually had made two controlled buys of marijuana from Smith before the search warrant request, one on November 12, 2003, and the other on November 13, 2003. Herkelman testified he was vague in his affidavit as to the number and date of the transactions to protect the identity of the CI. Herkelman testified he did not describe what a "controlled" buy was in his affidavit because the task force officers had used the standard precautions for controlled buys on both occasions, and Herkelman actually had monitored the controlled purchases with a transmitter. Herkelman testified he did not prepare a report relating to the transactions because he did not intend to make an arrest based on the transactions, but only intended to use the transactions as probable cause for a search warrant. Herkelman did not include in his affidavit the fact that he had checked utility records for the apartment, and had determined that the utilities were not in Smith's name.

Officers executed the warrant at 7:58 p.m. that evening. Neither defendant was present when the search team entered the apartment. In the southeast bedroom of the apartment, the officers discovered papers belonging to Jordan, $1900 in cash, suspected crack cocaine, suspected powder cocaine, and suspected marijuana. At 8:50 p.m., Jordan arrived at the residence in a vehicle, got out of the vehicle, and walked up the driveway toward the apartment. He was arrested near the door to the apartment for possession of the drugs found in his room, and he was subjected to a pat-down search. He then was taken into the apartment, where officers conducted a more thorough search and seized from his person two cell phones and $260 in cash. Jordan then was read the warrant and *Mirandized*.

III. ARE THE DEFENDANTS ENTITLED TO A FRANKS HEARING?

In Smith's (and, by joinder, Jordan's) motion to suppress, they argue that in Deputy Herkelman's search warrant application, he intentionally, or with reckless disregard for

the truth, presented false information to the state magistrate. They further argue that without this false information, the application did not contain probable cause to support the issuance of the warrant.

The first issue before the court is whether the defendants have made the requisite showing for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Under *Franks*, the court is required to hold a hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" 438 U.S. at 155-56, 98 S. Ct. at 2676. Further,

> [i]n the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. at 156, 98 S. Ct. at 2676. The same principles are true for material the defendant alleges was omitted from (rather than included in) a warrant affidavit.

Under *Franks*, before a defendant is entitled to a hearing, he must make a *substantial* preliminary showing that relevant information was omitted from the affidavit either intentionally or with reckless disregard for the truth. The substantiality requirement is not easily met. *See United States v. Hiveley*, 61 F.3d 1358, 1360 (8th Cir. 1995); *United States v. Wajda*, 810 F.2d 754, 759 (8th Cir. 1987). When no proof is offered that an affiant deliberately lied or recklessly disregarded the truth, a *Franks* hearing is not required. *U.S. v. Moore*, 129 F.3d 989, 992 (8th Cir. 1997). "A mere allegation standing alone, without an offer of proof in the form of a sworn affidavit of a witness or some other reliable corroboration, is insufficient to make the difficult preliminary showing." *Id.*

(citing *Franks*, 438 U.S. at 171); *see United States v. Ketzeback*, ___ F.3d ___, 2004 WL 369037 (8th Cir., Mar. 1, 2004);[2] *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986). The defendant also must show "that the allegedly false statement was necessary to a finding of probable cause or that the alleged omission would have made it impossible to find probable cause." *United States v. Mathison*, 157 F.3d 541, 548 (8th Cir. 1998).

The defendants have failed to make the required "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." *Franks*, 438 U.S. at 155-56, 98 S. Ct. at 2676. At the suppression hearing, they offered no evidence to support this contention, but instead simply asked the court to disbelieve the testimony of Deputy Herkelman, and therefore find that a *Franks* violation had occurred. This, the court will not do. The court finds Herkelman's testimony at the suppression hearing, and the statements he made in his affidavit, were true. The defendants also ask the court to find Herkelman's failure to include in his affidavit the fact that the utilities at the apartment were not in the name of the defendants was a *Franks* violation. The court finds this omission was unintentional and insignificant, and in any event, even if this fact had been known to the state magistrate, it would not have "made it impossible to find probable cause." *Mathison*, 157 F.3d at 548.

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[2]In *Ketzeback*, the court held:

> A facially valid warrant affidavit is constitutionally infirm if the defendant establishes the affidavit included deliberate or reckless falsehoods that, when redacted, render the affidavit's factual allegations insufficient to support a finding of probable cause. *Franks v. Delaware,* 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Omissions likewise can vitiate a warrant if the defendant proves "first that facts were omitted with the intent to make, or in reckless disregard of whether they make, the affidavit misleading, and, second, that the affidavit, if supplemented by the omitted information, could not support a finding of probable cause.'" *United States v. Allen,* 297 F.3d 790, 795 (8th Cir. 2002).

Ketzeback, ___ F.3d at ___, 2004 WL 369037, at *2.

Because the defendants have failed to show a *Franks* hearing is warranted, their request for a hearing should be **denied**.

The court also finds the affidavit submitted in support of the search warrant provided probable cause to support the issuance of the warrant under the standards set out by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317 & n.10, 2331, 76 L. Ed. 2d 527 (1983); *see also*, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) (in most circumstances, even if a warrant is invalid, if officers rely on the search warrant reasonably and in good faith, then evidence obtained from the search should not be suppressed.)

IV. SEARCH OF JORDAN'S PERSON

Jordan argues it was a violation of his rights under the Fourth Amendment to the United States Constitution to search his person under the "any person" language in the search warrant.[3] However, the court does not reach this issue because the court finds Jordan was searched incident to his arrest on drug charges, not pursuant to the warrant. A search incident to a lawful arrest is entirely proper. As the United States Supreme Court held in *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974):

> The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions. One of them permits warrantless searches incident to custodial arrests, . . . and has traditionally been justified by the reasonableness of searching for weapons, instruments of escape, and evidence of crime when a person is taken into official custody and lawfully detained.

[3]For cases addressing this issue, *see, e.g., Ybarra v. Illinois*, 444 U.S. 85, 100 S. Ct. 338, 62 L. Ed. 2d 238 (1979); *United States v. Flett*, 806 F.2d 823 (8th Cir. 1986); *United States v. Clay*, 640 F.2d 157 (8th Cir. 1981); *see also*, *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981); *United States v Guadarrama*, 128 F. Supp. 2d 1202, 1215 (E.D. Wisc. 2001).

Edwards, 415 U.S. at 802-03, 94 S. Ct. at 1236-37 (citations omitted). *Accord United States v. Lewis*, 183 F.3d 791, 794 (8th Cir. 1999); *United States v. Oakley*, 153 F.3d 696, 698 (8th Cir. 1998).

IV. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, that the defendants' motions to suppress be **denied**.

Any party who objects to this report and recommendation must serve and file specific, written objections by March 22, 2004. Any response to the objections must be served and filed by March 26, 2004.

If either party objects to this report and recommendation, that party must immediately order a transcript of all portions of the record the district court judge will need to rule on the objections.

IT IS SO ORDERED.

DATED this 16th day of March, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT